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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOARD of EDUCATION,
CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, *et al.*,
Appellants,

v.

EWALD B. NYQUIST,
Commissioner of Education, *et al.*,
Appellees.

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT OF THE CITY APPELLANTS

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QUESTIONS PRESENTED

Appellants are the school boards and students from Rochester, New York City, Syracuse and Buffalo, the largest school systems in New York State. Despite the cities' most restricted fiscal base for supporting schools and their greatest concentrations of students with special needs, the State's formula for aiding school districts considers appellants "wealthy"; accordingly, the statute apportions to them only reduced and below average aid for each pupil and reduced and inferior supplemental aid for each disadvantaged and handicapped pupil, resulting for many thousands of city students in the denial of resources required to achieve basic minimal educational skills. The Court of Appeals' "rational basis" disposition upholding the statute presents the following questions:

1. Is there a rational basis, meeting Fourteenth Amendment requirements, to justify inferior State education support for big city school districts in New York which suffer extraordinary fiscal pressures that reduce local school funds and which must also bear the extra costs of schooling vast numbers of educationally disadvantaged children?

2. Does a more exacting equal protection standard than the rational basis test apply under the Fourteenth Amendment to invalidate inferior support by the State education aid law to big city school districts, whose diminished school resources deny many thousands of disadvantaged pupils the opportunity to achieve even basic minimal educational skills?

3. Does a more exacting equal protection standard than the rational basis test apply under the Fourteenth Amendment to invalidate inferior support by the State education aid law to big city school districts, which causes schooling deprivation for the vast majority of the State's children from racial minorities and from poverty circumstances?

4. Did the Court of Appeals err in deeming *Rodriguez* (411 U.S. 1) dispositive of the federal equal protection challenge to a State aid law which provides inferior support for city school systems suffering the most restricted school funding capacity; enrolling the great majority of the State's blacks, Hispanic and poor children; and burdened by the greatest concentrations of pupils with special needs, many of whom are denied even the opportunity to acquire basic minimal skills? *

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* In addition to the school boards of Rochester, New York City, Syracuse and Buffalo, the following parties appeared below as plaintiffs: Abraham D. Beame, as Mayor of the City of New York; Lee Alexander, as Mayor of the City of Syracuse; Melvin Lechner, as Director of the Bureau of the Budget of the City of New York; Rosemary Brennan; John M. Franco, as Superintendent of Schools and Elizabeth Farley, as President of the Board of Education of the Rochester City School District; Irving Anker, as Chancellor, and James F. Regan, as President of the Board of Education of the New York City School District; Joseph Manch, as Superintendent of Schools, and Joseph E. Murphy, as President of the Board of Education of the Buffalo City School District; Edwin E. Weeks, Jr., as Superintendent of Schools, and Douglas H. Lyon, as President of the Board of Education of the Syracuse City School District; United Parents Associations of New York, Inc.; Christopher and Steven Fish, infants, by William E. Fish, their parent and natural guardian; Jose A. Rivera, an infant, by Ramon Rivera, his parent and natural guardian; Mark and Sonji Simkin, infants, by Nance Simkin, their parent and natural guardian; Tressy, Tina and Harold Dodds, infants, by Annie Dodds, their parent and natural guardian; Antoinette Grace Gifford, an infant, by Laura Gifford, her parent and natural guardian; Nancy Hruska, an infant, by Barbara Hruska, her parent and natural guardian; Andre Moses, an infant, by Estella Moses, his parent and natural guardian; Catherine, Raymond and Annette Plawden, infants, by Mary Plawden, their parent and natural guardian; Lisa Turner, an infant, by Marie Turner, her parent and natural guardian; Denise Brennan, an infant, by Rosemary Brennan, her parent and natural guardian; and Jeffrey Scott Owen, an infant, by Marcia Owen, his parent and natural guardian.

The defendants below were: Ewald B. Nyquist, as Commissioner of Education; the University of the State of New York; Arthur Levitt, as Comptroller and Mario F. Procaccino, as Commissioner of Taxation and Finance of the State of New York.

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JURISDICTIONAL STATEMENT OF THE CITY APPELLANTS

Appellants appeal from the final judgment of the New York Court of Appeals entered on June 23, 1982, holding that New York's statute providing reduced assistance to the Rochester, New York City, Syracuse and Buffalo school boards and their students (herein the "city plaintiffs") does not violate the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the New York Court of Appeals, which appears in our separate Appendix, pp. 1-34, is reported at 57 NY2d 27. The findings of fact pertaining to the city claims issued by the Trial Court, updated and affirmed by the Appellate Division and accepted by the Court of Appeals, are not reported. They are reprinted in our separate Appendix at pp. 160-235.

JURISDICTION

The judgment of the New York Court of Appeals, finding no constitutional violation in the challenged statutory provision, was entered on June 23, 1982. A notice of appeal to this Court was duly filed on September 8, 1982, and appears in the separate Appendix at pp. 329-30. On September 13, 1982, Justice Marshall signed an order extending the time for docketing the case to and including October 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL PROVISION AND STATUTE

The Fourteenth Amendment to the United States Constitution and the relevant provisions of the New York State school aid statute are set forth in our separate Appendix at pp. 331 *et seq.*

STATEMENT OF THE CASE

This appeal presents a constitutional challenge to the irrational reduction of State "equalizing" aid that the New York school finance statute accords to its big city school districts. The case commenced when property poor districts and their pupils filed suit against New York State's scheme of funding public education. Appellants here, the school systems and students from Rochester, New York City, Syracuse, and Buffalo, intervened to present their separate constitutional challenge. *These intervening plaintiffs assert discriminatory treatment by the statute of one million city public school pupils, most of whom are poverty-distressed minority group children.* Those children are not merely denied greater State help to overcome the learning disadvantages wrought by poverty, but are irrationally provided below average and reduced State school aid when their need for help is plainly the greatest. As a result of that reduced State support, vast numbers of city chldren lack needed school services and suffer educational underachievement, and many thousands are denied even the opportunity to achieve basic minimal skills or literacy.

Numerous trial witnesses described the plight of city schools under a State aid formula that purports to "equalize" the districts' schooling capacities but that so mismeasures the city districts' funding capacities that only below average and inferior aid is provided their students, including their disadvantaged children.[1] In four separate respects the State law discriminatorily diminishes payments for city children by assuming far greater urban district school funding capacity than actually exists. First, the statutory formula fails to recognize that the cities' school revenues are greatly reduced by much higher per capita costs for non-education services such as police, fire, and sanitation, which inexorably consume a disproportionate share of the cities' tax revenues. Second, the formula disregards the fact that costs of teachers and other staff and resources are substantially higher in cities than in smaller localities and rural districts, so that the education dollar in the city purchases fewer school resources. Third, the formula measures the tax base behind each pupil and dispenses the per pupil State share on the basis of average daily attendance rather than enrollment, thus penalizing the cities, which suffer from costly student absenteeism rates beyond their control. Fourth, even the State's supplemental funding for educationally disadvantaged and handicapped children is below average and reduced in the big cities, although those cities enroll the greatest concentrations of these most costly pupils.

Finding patent discrimination in the statute's "less favorable treatment of unequals," the Trial Court concluded that the statute's reduced payment to the cities lacks any rational basis, violating both the State Constitu-

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[1] The State's operating aid formula *purports* to equalize by providing additional assistance to school districts with a lesser capacity to finance schools. Its definition of such capacity is real property and income per attending student in each district. By that flawed definition, Rochester, New York City and Syracuse are deemed "wealthy" and therefore receive below average State aid for their students. Buffalo's aid is slightly above average but is also improperly reduced for the reasons set forth in the text.

tion and the equal protection guarantee of the Fourteenth Amendment. The Appellate Division affirmed the Trial Court's discrimination findings, emphasizing that contrary to the State Constitution's equal protection guarantee, the State law's unequal support to city education contributes to unparalleled pupil failure and illiteracy rates when it denies funds and resources which educationally disadvantaged children require. However, the Court of Appeals reversed, deeming *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) dispositive, though that case in no way involved state grants of below average and diminished aid to the hardest pressed school districts in the state (see *infra*, pp. 23, 26, 27).

Following this Statement of the Case, we urge as reasons for noting probable jurisdiction that 1) the rational basis requirement is clearly transgressed when a State aid statute provides city school districts overburdened with special need pupils below average and diminished assistance by a four-fold mismeasuring of their school funding capacities; 2) the Court of Appeals should have applied a stricter standard than rational basis to invalidate the aid law's disfavored treatment of city schools because thereby many thousands of educationally disadvantaged pupils are denied the resources to help them acquire even basic minimal skills or literacy, and 3) a stricter standard than rational basis is also applicable to invalidate the statute's inferior school support to the city schools, which educate the vast majority of the State's children coming from racial minorities and from poverty circumstances.

I. Historical Background

Public education was developed and made the special responsibility of the state particularly to provide the children of the poor a more equal chance in society. Thus, the founding New York law of 1812 established a public education system "in the expense of which the State would largely participate to bring

instruction within the reach and means of the humblest citizen," because "reading, writing and arithmetic . . . are essential to every person, however humble his situation in life" (1812 *Report of the Commission on Common Schools* 720, 724). Under the initial legislation the children of the poor nevertheless remained disadvantaged by "rate bills" charged parents to help pay the school costs; the abolition of rate bills was achieved at mid-century as a result of a national reform movement led by Horace Mann, who urged that the universal education which "prevents being poor" is "the great equalizer of the conditions of men" (L.A. Cremin, ed., *The Republic and the Schools* 85-87 (1957)). The historic 1850 Report on the State's first free schooling law by the Assembly's Select Committee (1850 *N.Y. Assembly Documents*, No. 150, at 6) similarly expressed the understanding that the State was bound to provide "schools which are open to all, where no one shall be excluded, whatever his race or comparative situation in life . . . and where all shall be on a perfect equality." In 1894 the egalitarian public education purpose was again reflected in the adoption of a constitutional clause requiring that the Legislature provide for the maintenance and support of a system of "free common schools wherein all the children of the State may be educated"; the education clause was appropriately named "the Children's Bill of Rights" by New York's preeminent constitutional historian (2 C. Z. Lincoln, *The Constitutional History of New York* 206 (1906)).

In succeeding years lack of revenue impaired schooling in many rural districts, prompting adoption in the 1920s of the "foundation" system of State aid directed to providing "apportionment [which] will vary according to the ability of the community to support its educational program" (1926 *N.Y. Senate Journal*, Vol. 2, *Executive Journal* 37). The foundation system's promise of equality, however, remains ephemeral, for the State's share of educational spending has diminished during a period when local inequalities of taxable wealth have been vast (OFF

9, A 116; OFF 12-14, A 117-20).[2] Even though the State provides "equalizing" school aid, the gap between the highest and lowest districts now reflects a 9-1 school spending disparity per pupil (Governor's 1982 Education Message 9). While the State's aid system to localities is thus inadequate to assure equal schooling for children in property poor districts, it is even worse in its *disequalizing* impact on children in the big cities. Large city districts most constrained in their funding capacity and overloaded in their teaching burdens are not yielded correspondingly greater compensating State assistance, but instead receive reduced and below average support under an aid formula which mismeasures their local school funding capacity.

As long ago as 1962, the Joint Legislative Committee on School Finance recognized the State law's flawed measurement of urban aid because the tax base available for education in other districts "is not equally available in an urban school district" (1963 *N.Y. Legislative Documents*, No. 11, at 165). The 1967 Report of the State's Board of Regents (p. 5) similarly emphasized that non-school municipal costs represent "a debilitating burden on the cities' capacity to finance necessary educational resources." In 1972 the Fleischmann Report to the Legislature (p. 105) again emphasized that "the rural bias in the original State aid formula has, by this time, become a suburban bias, even though now it is the *cities* which lack educational systems sufficient to the challenge of the day," because "a limited amount of public funds must be used to finance a large number of municipal services." When the Legislature nevertheless declined to reform the aid statute to take fair account of the unique city school

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[2] "A—" references are to the separate Appendix to this Jurisdictional Statement. In a few instances we have referred to the record before the Court of Appeals in a Joint Appendix; such citations appear as "JA ——." "IFF" references are to the findings of fact pertaining to the intervening city plaintiffs' claims; "OFF" refers to the findings of fact concerning the original plaintiffs' claims.

funding limitations and burdens, the city plaintiffs filed their intervention complaint in this suit including their claims based upon the Fourteenth Amendment. Their central claims of unequal treatment were sustained by voluminous Trial Court factual findings affirmed by the Appellate Division and accepted by the Court of Appeals.

II. The Trial Court's Findings and Conclusions

A. *The Statute's Four-Fold Mismeasurement of City School Funding Capacity*

Based upon evidence formidable in volume and depth of scrutiny—presented during an eight month trial—the Trial Court concluded that the State aid statute discriminates against children in the big cities in its four-fold mismeasurement of the funding capacities of big city school districts. As the Trial Judge found: "The State aid statute purports to equalize the disparate fiscal capabilities of the State's numerous school districts, including those located in large cities. It has been formulated in such a way, however, that when applied to the large city school districts, their capacity to finance public education with local resources has been overstated" (A 302). That "overstatement" results in severe reductions in the aid to which the city districts would be entitled if the formula properly measured their local school funding ability. Indeed, whereas some districts last year received amounts *exceeding $1,500 per pupil*, and the average district in the State other than the big city districts received $1,000 per pupil, Rochester, New York City and Syracuse received only $826, $931 and $935 respectively (IFF 140, A 179). This reduced aid exacerbates the plight of school districts burdened by the largest concentrations of special need pupils and by greatly restricted school funding capacity. In consequence, during the last school year New York City, serving vast numbers of disadvantaged children, ranked *fourth lowest* in spending per pupil among 161 school districts in the three downstate counties surrounding the City (*see* JA 6575-727). In-

deed, the City had $1,000 less per pupil to spend for its disadvantaged pupils than the *average* per-child outlay in those 161 suburban districts with their more fortunately circumstanced pupils.

As the Trial Court found, the State aid law's disfavored treatment of city schools, subjecting so many children to inferior schooling, arises from the formula's failure to give effect to: 1) municipal overburden, 2) higher city school costs, 3) higher city student absenteeism rates and 4) greater concentrations of special need students in the cities. We treat each of these in turn.

1. *Municipal Overburden*

For purposes of providing "equalizing" aid to school districts, New York's statute measures local capacity to finance schools by the value of local real property and income behind each of the district's students, and assumes that school districts throughout the State are equally able to draw upon their tax base for *school funds*. As the Trial Court found, that assumption is false for in city districts essential non-education services inexorably drain local revenues, reducing sharply those districts' ability to finance public education from local taxable resources (A 270-74). Unparalleled expenditures and tax levies for non-school purposes create a "fiscal imbalance" and prevent the city district "from devoting a normal proportion of its fiscal resources for education" (JA 1758, 1803-05).

As the Trial Court found, the higher noneducation expenditures in the cities that the aid law's local capacity measure disregards "are caused by the compelling, irresistible demands for municipal services that the urban environment and its characteristics create" (A 270). Those service demands and characteristics are detailed in its decision (A 269-73) and in more than one hundred findings of fact (IFF 18-130), which are reproduced in our separate Appendix at A 163-78. For example, the proportion of population below the poverty line in New

York City is more than 200% greater than in the neighboring counties (IFF 20, A 164), which means far larger welfare rolls. As the Court found concerning New York City, Buffalo, Rochester and Syracuse (A 271): "[c]oncentrations of the poor and the elderly, large numbers of persons on public assistance rolls, high levels of unemployment and low education levels have all combined to increase municipal expenditures. To the foregoing must be added the cost-producing factors of old housing stock, deteriorating municipal facilities and a severe economic decline in recent years." Municipal overburden also is reflected in specific disproportionate service needs for police, fire, public assistance, health, corrections, courts, mass transit, parks and recreation, housing and school construction.[3]

As a result, while jurisdictions outside New York's four largest cities were able to spend 45% of their local taxes for schools, the cities could spend only 28% (IFF 7, A 162). Measured in per capita terms, noneducation outlays were much higher in the four cities than in their surrounding counties and the rest of the State; in New York City $401.06 was the per capita expenditure from local revenue for noneducation purposes whereas only $183.17 was spent per capita in the rest of the State (IFF 14, A 163). The Court concluded that "New York's aid formula overstates the cities' capacity to finance their schools" by disregarding "the 'municipal overburden'

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[3] In a typical functional area, police services, the Court found that the four cities spend 2 to 6 times per capita more than their suburbs (A 271; IFF 54, A 169). This greater drain on the local tax dollar for police protection reflects a nationwide pattern in which the larger the city, the higher the per capita cost of police services and police employees (IFF 55, A 169). Based on undisputed testimony, the Court concluded that higher crime rates in the cities arose from their greater population density, poverty and unemployment and necessitated greater expenditures for police services. For example, the evidence showed that some city census tracts with high poverty and high unemployment had crime rates 50 to 100 times those of the suburbs or of city fringes (IFF 60, A 169).

drain of non-educational services on the local tax dollar" (IFF 3, A 162).

2. *School Costs Overburden*

The aid formula's disregard of the cities' municipal overburden which reduces their school resources is compounded by its distribution of aid on the assumption that the local school dollar has the same education resource purchasing power throughout the State's school districts. The assumption is false, as the Trial Court found, for the purchasing power of the education dollar is substantially less in metropolitan areas and particularly in the New York City metropolitan area (IFF 148-58, A 180-81). The average spending per pupil in metropolitan area districts is 29% higher than in rural districts for the minimum education program mandated by the State (IFF 150, A 180). Large city school districts, for example, must pay more to attract teachers who often view their schools as less desirable than schools in the suburbs (IFF 159-73, A 181-83). Contributing to this perception, the Trial Court found, are the problems in many city schools of large classes, with a high percentage of disadvantaged children, deteriorating buildings, limited supplies, violence and vandalism (IFF 161, A 182).[4]

The Trial Court concluded that the aid formula "[d]isregards the diminished power of the urban dollar in purchasing educational resources as a result of the higher cost factors in the cities" (A313).

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[4] New York City is particularly disadvantaged because it is in the high cost downstate part of the State. For the minimum education program directed by the State, average expenditure per pupil downstate was 47% higher than upstate (IFF 149, A 180). The higher costs downstate were also shown in teachers salaries, the largest component of the school budget, where the average salary in the New York City metropolitan area was 30% higher than upstate (IFF 155-56, A 181). As the trial court found, "[m]edian salaries for teachers by degree and experience level show that downstate districts must pay more than upstate to purchase the same educational resource" (IFF 157, A 181).

3. *Student Absenteeism Overburden*

The aid statute exacts a further toll from absenteeism-plagued city school systems in using attendance rather than enrollment as the measure of local funding capacity and of per-pupil aid entitlement.[5] The schools in New York's largest cities bear a burden of severe student absenteeism; the 16% average daily absenteeism rate of the State's five largest cities is almost triple the average elsewhere in the State (A 276; IFF 184, A 184). The problem is most acute in the secondary schools; in New York City's academic high schools over 26% of the students are absent on an average day (IFF 185, A 184; JA 4103).

On the basis of extensive testimony, the Trial Court found that city schools cannot prevent excessive absenteeism rates because: "the causes of high absenteeism in the large city school systems are traceable to poverty and its associated conditions. Some of the contributing conditions associated with poverty were shown to include higher incidence of illness among children from impoverished homes; lack of warm clothing in cold months; pupils kept at home to care for younger children in the family; lack of parental encouragement to attend school; impaired mental and emotional health; and lack of success in school" (A 277; IFF 191-201, A 185-86).

A class with 84% attendance still requires a whole teacher. High absenteeism produces not savings but greater costs for city school systems, because it generates the need for more attendance services and for costly

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[5] The statute measures district wealth for determining aid for each pupil unit on the basis of average daily attendance rather than enrollment and provides aggregate aid to the school district on the same "ADA" basis. A district's "wealth" or school funding capacity is first calculated by dividing its real property valuation by total wealth pupil units (TWPU), a construct based upon average daily attendance; because absenteeism renders the pupil count in the denominator artificially low, the city districts' wealth per pupil is overstated (IFF 179-80, A 183-84). The district's aggregate aid is then computed by a pupil count also based upon average daily attendance.

repetition and remediation programs to assist children whose learning is hampered by irregular attendance (IFF 186, 188, 189, A 184-85). Yet instead of helping the cities to meet the additional schooling burdens from severe absenteeism rates, the statutory formula doubly reduces support to the cities on that account (see p. 11, n.5 *supra*). The Trial Court concluded that the formula's use of an attendance-based pupil count "disregards the increased school costs caused by the far higher rates of student absenteeism prevailing in these city school districts and actually penalizes the city school districts for their higher student absenteeism" (A 313).

4. *Special Need Student Overload*

A fourth discrimination in the statute is its below average and reduced supplemental help for the cities' special need children. New York's largest cities have unparalleled numbers and concentrations of disadvantaged, handicapped and other students with special school needs (A 314). For example, in the four city districts which enroll 37% of the State's pupils, some 56% of the State's educationally disadvantaged pupils are concentrated (IFF 217, A 188); yet their additional State aid for such students is below average and reduced.

The State formula, as the Trial Court found, "recognizes that pupils who are disadvantaged, handicapped or have other special needs require costly special services intended to cope with the difficulties such pupils encounter in acquiring their education" (A 278). This recognition is in the form of added weightings in the calculation of aid for disadvantaged and handicapped students. But as the Trial Court concluded: "While the weightings furnished extra aid, the aid from such weightings has itself been reduced because the weightings have been integrated with a measure which has, at an earlier step of computation, treated the urban districts as less in need of aid than they actually were. The flawed result of a process intended to help meet the added costs of educating

disadvantaged and . . . handicapped pupils has been, according to the evidence, to provide reduced and below-average assistance to the cities burdened with the greatest numbers and concentration of pupils in those categories" (A 279).

On the basis of the foregoing detailed factual findings concerning the statute's four-fold mismeasurement of the cities' school funding capacity, the Trial Court concluded that the "failure to provide State aid on an equitable basis deprived the children in the large city districts of an equal education opportunity" (A 292). Its central ruling was that the statute's inferior support for city schools and children does not pass muster under the rational basis test. The formula's failure to give effect to the factors uniquely burdening the big cities works "an arbitrary and irrational deprivation of state aid" that violates the Fourteenth Amendment of the United States Constitution (A 314). In that respect the formula was found to contravene the statute's own "major purpose" of "equalizing the varying capabilities of the State's school districts to finance public education" (A 302). In failing to recognize that municipal overburden and other factors inexorably reduce the city districts' capabilities to finance education, the statute classifies them as less needy of aid—a classification found to bear "no reasonable relation to the statute's purpose of providing state aid to districts in proportion to their need" (A 303, 305).

B. *Injurious Impact of Reduced State Aid Upon Educationally Disadvantaged Students in the Cities*

While all city children suffer from the reduced State aid, the Trial Court found particular injury to educationally disadvantaged city pupils. In the Trial Court's ultimate equal protection ruling, it was a vital consideration that *the arbitrary four-fold reduction in the State's school payments to city districts harms the children with the greatest need for quality education and extra school resources.* As the Trial Court found, poverty is the over-

whelming reality for most city school children and is the root cause of their educational disadvantage (IFF 247-56, A 194-95).[6] The resulting educational problems that require expensive remedial services denied by the statute's reduced aid to the cities were organized by the Trial Court under several major subjects (A 284-90):

Impaired learning readiness. Poverty in New York's large cities, with its concomitant lack of adequate housing, food, pre-school experience, and parental instruction and supervision, often puts city children significantly behind even as they enter school (IFF 259-62, A 195-97). Many inner city children begin school without knowing even basic colors or body parts, not comprehending concepts like "same," "different," "in front of," and "beside," not understanding the language of the teacher, unable to follow verbal directions or use pencils and scissors. Such children spend their initial schooling struggling to learn these skills and concepts and fall behind quickly unless they receive prompt special attention and assistance—which requires resources the aid law now denies to city schools (A 196-98, 285).

Impaired learning progress. The conditions that handicap the cities' poor children as they begin school—inadequate nutrition, clothing and medical care, crowded and substandard housing, and lack of supervision and instruction—often continue throughout schooling to exert their detrimental influence (IFF 272-273, A 199). Such conditions "produce a cluster of adverse effects upon chil-

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[6] State data updating the findings show that as measured by the standard that makes children eligible for free school lunches, 55% of New York City's pupils—some 515,000 children—are poor, as are half those in Syracuse and Rochester and two-thirds of the school children in Buffalo. Moreover, more than 70% of all the State's poverty children are in the four cities. (Approved Applications for Free Lunch, State Education Department, Bureau of School Foods Management, March 1982 Program Data for All Schools, CN 348, 8/20/82.) At the time of trial New York City alone had two-thirds of the State's AFDC recipients. (A 284; IFF 248, A 194).

dren's work in school, that include distraction from school work, undone homework, disruption of the progress of learning in a sequential manner, and lack of motivation to attend school and to achieve" (A 285-86; IFF 274, A 200).

Mental and emotional problems. Disproportionate numbers of the big city children suffer from severe mental and emotional problems that are caused or aggravated by urban poverty circumstances (IFF 286-90, A 202-04). The result is impairment in school performance; reading difficulties, thinking slowly, and low intellectual functioning; and juvenile delinquency and withdrawn or disruptive behavior in the classroom (IFF 290, A 203-04), all of which require expensive extra resources for their remediation.

Impaired physical health. Sickness and physical disabilities, likewise rooted in poverty conditions and attendant inferior medical care, are much more common among poor children (IFF 304-315, A 206-08). In consequence, city children have more sick days and injuries, more resulting school absence, and often suffer from uncorrected vision problems, hearing deficiencies, and malnutrition—conditions that limit participation and comprehension in school and call for costly remedial services (e.g., IFF 307-10, 316, A 206-07, 208).

Handicapping conditions. The city schools enroll a highly disproportionate number of pupils with handicapping conditions for whom expensive testing, evaluation and special education are mandated by law (IFF 323-45, A 209-12). The four city plaintiffs, with 37 percent of the State's public school enrollment, have 57 percent of the State's most costly handicapped pupils (those requiring special programs three-fifths or more of each school day) (IFF 324, A 209-10).

Limited English proficiency. Most of the State's more than 100,000 children with limited or no facility in English are in city schools, and by law must receive special

and more expensive instruction enabling them to participate in school in English (IFF 363-65, 369-70, A 219, 220).

Occupational education. A disproportionate number of city pupils seek to go into trades; the percentage of occupational education enrollment in the three upstate cities is two to three times that of their suburbs (IFF 381-84, A 222-23). Vocational education costs hundreds of dollars more per pupil because it requires high capital outlay, more highly skilled teachers, and smaller class sizes (IFF 385-87, A 223).

The Trial Court found that additional but costly education resources now denied by the statute's reduced support could alleviate or cure each of the foregoing conditions that particularly afflict city school children. With the provision of proper educational resources and programs, learning barriers which are "largely the products of poverty" can be "remedied or substantially ameliorated" (IFF 257, 428; 264, 277, 291, 317, 396-99, A 195, 229; 197-225). But successful compensatory education requires concentrated resources which entail extra costs; and lack of funds exacerbated by the arbitrarily reduced State support to city schools leaves them unable to provide the services that could help disadvantaged children succeed in school. For example, "The cities, with their reduced State aid, cannot afford to provide the services necessary to test, evaluate, treat and instruct all of their handicapped children" (IFF 354, A 214). "The cities, with their reduced State aid, cannot afford to develop adequately the English language facility of their great concentrations of pupils who speak and read little or no English" (IFF 377, A 221; see also IFF 268, 278-80, 293-303, 318-22, 350-53, 355-59, 376, 378-80, 385-91, 397-408, A 198-226). Indeed, among the successful experimental programs described at trial, all of which reached only a small percentage of special need pupils, lack of funding required many to be cut or eliminated altogether (e.g., IFF 271, A 198).

Numerous witnesses described the effect upon disadvantaged city school children of school funding and resource shortages exacerbated by the State law's inferior support to the cities. Thus, according to a Rochester kindergarten teacher, in a simple test of basic concepts administered to her entering class, 29 of 30 five-year olds could not determine whether a book was upside down, 29 of 30 could not mark the picture of the object that rhymed with "spoon," 24 of 30 could not determine that the nose was missing on the picture of a girl, and 24 of 30 could not identify a picture of an apple cut in half. Yet classes last only half a day, are taught by a single teacher without assistance, and have 32 to 33 children each, and sometimes more. Large numbers of children leave such underfunded kindergartens unprepared for first grade; at year's end, one-fourth of the school's kindergartners were held back, and of those sent to the first grade half were unready (JA 2486-527).

Junior High School 65 in lower Manhattan is situated in an area characterized by extreme economic deprivation, inadequate and limited social services, dense population and deteriorated and crowded housing. Students live in apartments where they lack even a bookshelf, let alone a place to study and do homework. Although they are only twelve to fourteen years old, over half of them work long hours in restaurants and garment factories. Many are immigrants who know little or no English, and some arrive totally illiterate even in their own language and must be taught rudimentary skills.[7] For lack of resources, in the year before trial the school had English as a Second Language classes for only 270 pupils, with 30 in each class, which means a maximum daily time for practice in

[7] There are teenage Dominicans, for example, who come "with a completely clean slate and, when I say a clean slate, I mean that they do not know the alphabet. We must take them and teach the A-B-C-D, we must teach them what a word is. We then have to teach them sentences. They do not know the number system. . . . They use tally marks. . . ." JA 3053-54.

speaking of 90 seconds per child. At least 600 children in the school are unable to function adequately in English and half the 7th graders read at 4th grade level or below. The whole school of 1800 pupils can afford only two remedial reading teachers and only one counselor, though hundreds of pupils need counseling for severe academic and social problems that impede their learning (JA 3048-90, 3181-95).

Charles Evans Hughes High School in New York City is attended almost exclusively by low-income students yet lacks the school resources that such pupils require. When ninth graders were tested 36 percent did not even appear; of the remainder (excluding limited English proficiency and mentally retarded students), 70 percent were two years or more behind in reading and over 25 percent read at a fourth grade level or below. Some students "are illiterate. They may know some of the letters of the alphabet but not all of them. They may not know the sounds that those letters make." Most others can decode the words on a page but cannot understand them; they do not connect reading with thinking. The students are unable to use graphs or maps or indexes; some "may not be familiar with the fact that Europe is an area, that it is not a city or a country or a state in the United States." Of 819 students who had entered the last graduating class at Hughes, only one-third remained as seniors and fewer than a fourth of those who started actually received diplomas. The majority of those who drop out do so "because of academic problems that include poor reading ability, poor math ability, and truancy problems that are tied up with poor reading ability and poor math ability and poor basic skills" (JA 3292-310).

These situations are replicated in other schools throughout the big cities. The Trial Court found that the cities' inability to afford remediation for such problems "has had effects on a great number of pupils that are both serious and tragic" (A 290). It noted that 16% of Roch-

ester twelfth graders read at fifth grade level or below (IFF 411, A 226), that thousands of New York City ninth graders scored at fourth or even third and second grade levels in reading tests (IFF 412-13, A 226-27), and that the cities' pupils are clustered in the bottom levels in the State's testing program (IFF 417-23, A 227-28). Although such "problems of educational failure and severe underachievement can be remedied or substantially ameliorated," the State's reduced payments to the city schools mean that they "cannot afford to provide effective remedial education to all their students who are underachieving and failing in school," and as a result "thousands of students in the big city school districts fail to achieve even basic minimal skills" (IFF 409-38, A 226-30). The Trial Court found that "large numbers and concentrations of pupils in large urban school districts, seriously deficient in basic minimal educational skills are denied an opportunity for meaningful participation in the educational program" (A 308).

The poverty from which both city children and city schools suffer simultaneously creates acute learning problems for poor children and drains the cities of the funds needed to deal with those problems. Yet instead of receiving extra school help, under the State school aid law impoverished children with the greatest schooling needs experience a public education that is itself impoverished. As a result, "[m]any disadvantaged pupils receive not compensatory education and enrichment, but lesser resources than pupils elsewhere because class size and pupil-staff ratios in the cities are among the largest in the State, while facilities and support services are among the most constricted" (IFF 284, A 202). The Court concluded (A 308) that "'[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike' . . . If equal treatment of unequals is discriminatory, then providing less favorable treatment of unequals has to be regarded as even worse discrimination."

III. The Ruling of the Appellate Division

The Appellate Division reviewed and affirmed all of the Trial Court findings relating to the city plaintiffs' claims (A 160-235). Thereby it confirmed the existence and fiscal impact of the cities' municipal overburden, costs overburden, student absenteeism overload and special need pupil concentrations, as well as the discriminatory impact on disadvantaged children of a statute that disregards these realities in providing inferior support for city schools. The Court went on to formulate additional findings concerning the results of "budgetary constraints resulting from the operation of the school financing scheme" (IFF 447-75, A 231-35). For example, in Buffalo the entire elementary school library system had been eliminated (IFF 474, A 235); New York City and Buffalo were fiscally unable to provide vocational education for all students seeking to enroll (IFF 452, 461, A 232, 233); Buffalo schools were impeded in providing bilingual education, remedial mathematics and remedial reading programs for children in grades four through eight (IFF 460, A 233); and thousands of handicapped children did not receive appropriate help and remediation because of lack of funds (IFF 466-68, 473, A 233). A special concurring opinion by Judge Weinstein underscored that in denying equal treatment and needed resources to the city schools, "the education aid formula has a disproportionately adverse effect not only on pupils from impoverished families, but also with respect to race, country of origin and alienage" (A 72).

Though it found no violation of the Federal Constitution, the Appellate Division affirmed the Trial Court's conclusion that the equal protection clause of the State Constitution is transgressed by its "arbitrary deprivation of state aid" due to the aid formula's failure to recognize municipal overburden, the higher city school costs, the absenteeism overload, and its reduced supplemental assistance for special need pupils in the cities (A 93-94). It further found that the aid formula "denies equal educa-

tional opportunity and equal treatment" to children in city school districts which "have the most difficult and most expensive school populations to educate," because it "fails to give fair and adequate consideration to their special and severe educational overburdens" (A 94).[8]

The Appellate Division opinion (A 68-69) concluded with the emphasis that "*unconscionable numbers of children fail to acquire basic educational skills*" and that the New York State school finance scheme "*is in good measure a cause for the failures*":

> "We cannot ignore the findings that thousands of children fail to acquire even minimal skills in reading, vocabulary and mathematics in lower grades and later underachieve or fail because they lack those skills; that thousands who pass through the school system can only decode words without comprehending them, cannot use graphs, maps or indexes, and cannot apply acquired knowledge—minimal as it may be—to solve problems; that thousands who attend high school read at a fifth grade level or below and some of these read at a third or even second grade level; and that some students leave the system wholly illiterate. . . .
>
> We harbor no illusion that all the failings in pupil achievement we have described flow from incompetence of the educational system, for we are aware of other deep-seated societal and familial failures which contribute in substantial degree to the prob-

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[8] The Appellate Division emphasized that by 1980-81 "New York City's percentage of the State's special needs pupils had risen to 51% as against 33% of the public school enrollment and 29% of [State] education operating aid," and that "disproportionately low State aid to the cities continues" (A 48). The Court thereby echoed the concession of defendants' own chief expert witness (Lois Wilson of the State Division of the Budget) who agreed that there are "basic inequities in the present formula in the amount of money it provides for the City of New York," particularly in view of "the proportion of pupils with special educational needs in the City of New York [and] the problems of full valuation per resident WADA as a measure of wealth for the City of New York" (JA 5048).

lems of educating disadvantaged youth. Nevertheless, the record before us establishes that many of the children who fail to obtain minimal skills are educable and that properly staffed remedial programs, which afflicted school districts are prevented from providing because of fiscal constraints and misallocation of resources, do alleviate or totally remedy learning problems. In sum, despite their disadvantaged background, many of those who leave New York's education system undereducated could be provided with skills which would equip them for life's future demands."

IV. The Ruling of the Court of Appeals

The Court of Appeals opinion accepts the "factual determinations made by both courts below" (A 11), including the extensive findings of the schooling disadvantages suffered by children in the city districts. Specifically it notes that "in consequence of the economic factors of metropolitan overburden the net effective economic ability of the city districts falls well below that of non-city districts," and it accepts the findings that "the four major cities represented by the intervenors . . . are forced to provide instructional services and facilities of a lesser equality, variety and quality. . . ." (A 12). Moreover, the Court concedes the presence of "great and disabling and handicapping disparities in educational opportunities across our State, centered particularly in our metropolitan areas . . .", and also recognizes "the existence of the very real disparities of financial support as found by the lower courts" (A 23, 13). The Court nevertheless applies to the school finance law the least exacting "rational basis" equal protection standard, and reverses without even suggesting what basis justifies the recognized schooling inequalities which the State's "equalization" formula thrusts upon city children. Although the Court refers to the competition for urban dollars between schools and other urban services (A 15)—pressures which the lower courts found to be inexorable—it nowhere suggests what basis justifies the State formula's reduced sup-

port to the cities by its four-fold mismeasurement of their school funding capacity.

A forceful dissenting opinion by Justice Fuchsberg emphasizes that the "simplistically conceived 'equalization' formulae are the cause of a perverse disequalization effect on education" in the big cities (A 28). The opinion underscores that the cities' aid entitlement is multiply mismeasured by the statutory aid formula (A 27-28), and that "the failure to provide State aid on an equitable basis deprives the children in the large city districts of an equal education opportunity" (A 29). Such unequal treatment, the dissent further emphasizes, puts this case well beyond *Rodriguez*, where *"there was no claim that the statute malapportioned State school aid by mismeasuring the funding capacities and needs of city districts"* (A 33). That city plaintiffs' claim here, presenting issues never addressed in *Rodriguez*, invokes vital equal protection questions for this Court's review.

SUBSTANTIAL FEDERAL EQUAL PROTECTION ISSUES ARE HERE PRESENTED FOR REVIEW

1. *A primary question for review arises from the lack of any manifest rational basis suggested by the Court of Appeals to justify the inferior treatment that the New York statute thrusts upon students in big city districts, most of whom are educationally disadvantaged pupils.* In a detailed opinion, supported by hundreds of factual findings affirmed by the Appellate Division and accepted by the Court of Appeals, the Trial Court concluded that the statute's disregard of the four city overburdens is arbitrary and discriminatory in its resulting reduced support to city districts and their children. The Trial Court particularly noted that the purpose of the statute is "to equalize the ability of the State's public school districts to finance education" (IFF 1, A 160); yet in its overstatement of the cities' ability, resulting in a sharp reduction of State aid, the formula disserves its "equalizing" purpose (cf. *Weinberger* v. *Wiesenfeld*, 420

U.S. 636, 651-52 (1975)). Instead of the exceptional State aid to which the city districts are entitled by any fair equalization formula, they do not even receive the average level of State support. As to the city school systems with their vast numbers of educationally disadvantaged children with greater schooling needs, the law is patently discriminatory, providing "less favorable treatment to unequals."

Yet nowhere does the Court of Appeals rationalize the statute's four-fold mismeasurement of the school funding capacities of the cities. Thus there is no rejoinder to the lower courts' finding that the statute overstates city funding capacity because a disproportionate share of the city revenue base is inexorably taken by non-school services and thus unavailable for education. The school finance formula indulges in the fictitious assumption that taxable resources are as available for education in the cities as elsewhere, an assumption that the lower courts found results in a vast overstatement by the formula of the cities' school funding capacities and an arbitrary reduction in their share of State support.

Another arbitrary inequality in the aid formula which the Court of Appeals ignored flows from the misassumption that the education dollar has the same purchasing power in the cities as elsewhere. In New York's large cities, the school revenue derived from the local tax base purchases fewer teachers and other staff and resources. For a capacity-based "equalizing" aid statute to ignore this reality is to malapportion aid payments by mismeasuring the differences in school funding capacity that it purports to redress.

Equally ignored by the Court of Appeals are the lower courts' findings that the formula overstates the assumed funding base of the cities in measuring that base and dispensing aid by average daily attendance rather than by full student enrollment. Finding that severe absenteeism in the big cities is the inexorable result of urban poverty conditions, the lower courts concluded that the use of

the attendance standard that reduces State support is the more unjustified because high absenteeism requires additional expenditures to bring in truant students and to help those who have missed days of instruction.

Nor does the Court suggest any justification for the formula's reduced special support for disadvantaged and handicapped students in the cities. The enormous concentration in the four cities of the State's special need children, who require costly compensatory services, multiplies geometrically the problems in the urban classroom. Yet instead of providing more "disadvantaged" and "handicapped" supplements for such city children, the statute arbitrarily provides fewer dollars for their education.

Notwithstanding the unchallenged findings that the statute indulges in this four-fold mismeasurement of the city districts' aid entitlement, the Court of Appeals denies relief without ever suggesting a rational basis that could justify the State's inferior treatment of the city schools where most of the State's educationally disadvantaged children receive their preparation for adult responsibilities. Without questioning the lower courts' factual conclusions concerning the cities' unique overburdens disregarded by the school finance law, the Court of Appeals adopts a sweeping abstentionist posture that leaves public education inequality beyond any constitutional remedy. Whereas New York's lower courts specified in detail the facts that deprive the school aid statute of any rational basis for its reduced support to city children, the Court of Appeals provides no explication at all of its ruling against the city plaintiffs' equal protection claims. This Court recently ruled in *Zobel* v. *Williams*, —— U.S. ——, 102 S.Ct. 2309 (1982), that a state must show a tangible rational basis to justify giving some of its citizens less financial aid than it gives to others. Surely the rule in *Zobel* is no less applicable here, where by arbitrarily giving hundreds of dollars less support for the education of each city school child the

State diminishes the learning resources provided those with the greatest need for quality schooling.

2. *An equally substantial issue arises from the Court of Appeals' application of the least rigorous equal protection standard, even though the State's reduced support to city schools leaves many thousands of their disadvantaged children unable to gain even basic minimal skills or functional literacy.* The Court of Appeals woodenly applied *Rodriguez* to the city plaintiffs' claims, testing the discriminatory treatment of city school children by the rational basis standard; but unlike the Texas finance law which especially aided poor districts with low funding ability, New York's statute perversely compounds the fiscal distress of the city districts with its dispensation of arbitrarily *reduced* aid. Moreover, unlike *Rodriguez*, where this Court noted (411 U.S. at 37) that "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire . . . basic minimal skills . . .," here that charge was not only made but proven. As the Trial Court found, "Many pupils fail to acquire basic minimal educational skills. . . . In its restriction of aid to these city districts and its disregard of their educational burdens the aid statute denies such children equal opportunity to acquire basic minimal educational skills" (A 314). The Appellate Division similarly found that in large measure due to diminished and insufficient State support for education in the cities, many children who could achieve are not becoming educated and some remain "wholly illiterate" (see pp. 21-22 *supra*).

These findings of discriminatory statutory treatment resulting in denial of opportunity to become educated—findings left unimpaired by the ruling below—invoke the same considerations which recently impelled this Court to apply the intermediate "substantial relationship" standard of equal protection in *Plyler* v. *Doe*, —— U.S. ——, 102 S.Ct. 2382, 2398 (1982). Of course, in *Plyler* there was total denial of free schooling to illegal aliens

whereas here it is the State's below average and reduced school support that is contributing to the creation of an uneducated "subclass" in New York's big cities (102 S.Ct. at 2401-02). But in terms of adverse impact both on the child and on society the results here are no less severe than they were in Texas, for many thousands of children each year must remain illiterate when New York State's unequal aid to the cities deprives them of means to address severe learning disadvantages suffered by so many children. Under circumstances highly analogous to those decisive in the recent *Plyler* ruling, the refusal of the Court of Appeals to apply the intermediate "substantial relationship" standard of equal protection presents an important occasion for this Court's review. For if that is the applicable test, there is nothing here presented that could possibly meet that standard's requirement of an *"exceedingly persuasive justification"* to excuse the State's unequal treatment of its school children. See *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981); *Mississippi University for Women* v. *Hogan*, —— U.S. ——, 102 S.Ct. 3331, 3336 (1982).

3. *An additional equally substantial question arises from the fact that the statute's discriminatory treatment of city districts thrusts school inequality on the vast majority of the State's children from racial minorities and from poverty circumstances.* In its inferior treatment of city schools the statute diminishes the education available for the vast preponderance of the State's children who come from racial minorities and the great majority of those who live in poverty. Accordingly, the Court of Appeals' rational basis approach conflicts with this Court's ruling applying rigorous constitutional review to unequal public education benefits for members of suspect classes (*Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *Toll* v. *Moreno*, —— U.S. ——, 102 S.Ct. 2977 (1982), and invokes the considered caveat of *Rodriguez* (411 U.S. at 22-23, 26) concerning a public school finance system which provides inferior education to the state's poor children.

At the time of the trial below, of the 565,293 black school children in the entire State, 80.5% were in the four city school systems that receive diminished State school support (JA 2399-2400). As of 1981 this concentration remained unchanged—among the State's 517,007 black school children 79.5% were in the four big city school systems (*Racial/Ethnic Distribution of Public School Students, 1980-81*, State Education Department, Albany, N.Y.). Similarly, among the 329,964 Hispanic school children in the State, 89% were in those same city school systems, and New York City alone accounted for 87.1% (*id.*). In sum, among the State's school children who are blacks and Hispanics, 83.1% attend city schools discriminated against by the State finance formula. Moreover, among the State's entire population of poverty children over 70% are in the four big city school systems (see *supra*, p. 14 n.6). Thus, *when measured by its impact on suspect racial and national origin classes and by its impact on the poor, the State's school aid law clearly disadvantages discrete and insular minorities whose relative powerlessness invokes exacting constitutional protection against unequal statutory treatment—overcoming the presumption that inequality will be rectified by the democratic process.* Cf. concurring opinion of Justice Blackmun in *Toll, supra*, 102 S.Ct. at 2989. Surely no more to its poor and minority group children than to its illegitimate children may the State deny "substantial benefits accorded children generally." *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973).

That is the central thrust of the concurring opinion by Judge Weinstein in the Appellate Division (A 69-76). Reviewing data reflecting the enormous numbers of the State's minority group and poor children concentrated in the big cities, he emphasized that "the education aid formula has a disproportionately adverse effect not only on pupils from impoverished families, but also with respect to race, country of origin and alienage" (A 72). The opinion accordingly urges application of the

heightened standard of equal protection because the statute "has a disproportionately adverse effect with respect to so important a right as education on the vast majority of the State's minority students. *Minority children with greater needs are receiving not equal, but less aid*" (A 75). In like vein, the dissent by Judge Fuchsberg in the Court of Appeals emphasizes that the State's formula has adverse affect "not only on pupils from impoverished families, but also on a large percentage of the nearly 750,000 'minority' students in the State," presenting an issue of discrimination arising from "the inability of these cities, left bereft of the means to do so, to cope with the social and education breakdown affecting a large group identifiable by race, country of origin or alienage" (A 33). The opinion concludes that "poor children no less than rich . . . are entitled to an education that prepares today's students to face the world of today and tomorrow" (A 34).

It is thus of ultimate import that the statute subjects the vast majority of the State's racial minority and poor children to inequality, thrusting educational underachievement and school failure on so many of the least fortunate in our society. Since the statute gives unequal treatment to the State's black and Hispanic pupils, there may be no need here also to resolve the poverty question left open by *Rodriguez* (411 U.S. at 22, 26)—whether equal protection permits a school finance scheme "designed to operate to the peculiar disadvantage of the comparatively poor." Nevertheless, it is significant that the statute subjects to systematic denial of equal education 70% of the State's poverty children clustered in the four city school systems. When the politically powerless poor and minority children are denied equal opportunity in a public system, there is every reason for application of the "searching judicial inquiry" that remains the historic promise of *Carolene Products*.[9]

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[9] Moreover, the general inferiority of public education for the poor takes on added equal protection significance when it is con-

CONCLUSION

The unequal treatment to which the New York statute subjects most of the State's educationally disadvantaged, racial minority and poverty children cannot survive the Fourteenth Amendment's guarantee when measured by the rational basis test, and even more obviously when tested by the more exacting standards the Court of Appeals should have applied. Surely only a most cogent justification could excuse an "equalizing" statute's mismeasurement of local schooling capacity in the cities, when the resulting diminution of educational resources means reduced achievement that will haunt children throughout their adult lives and impair their opportunity for a productive role in society. The absence here of any cogent justification makes this a vital case for vindication of school children's rights under the Fourteenth Amendment's equal protection guarantee.

It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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sidered that it was particularly for the *benefit* of the poor that the State originally established public education. (See pp. 4-5 *supra*).